No. 96-1569

In The

# Supreme Court of the United States

October Term, 1996

DANIEL BOGAN AND MARILYN RODERICK,

*Petitioners,*

v.

JANET SCOTT-HARRIS,

*Respondent.*

**Petition For Writ Of Certiorari**
**To The United States Court Of Appeals**
**For The First Circuit**

## OPPOSITION TO PETITION FOR CERTIORARI

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## STATEMENT OF THE FACTS

Janet Scott-Harris was the first African-American to work for the city of Fall River, Massachusetts in an administrative position, the first African-American directing white persons. She was the only African-American working in Fall River City Hall.

Ms. Scott-Harris worked in a high level position in Fall River, reporting directly to the city administrator and the mayor. She superyised four departments: the Department of Health, the Department of Veterans Affairs, the Building and Code Enforcement Division, and the Council on Aging. Ms. Scott-Harris excelled in her job. The defendants agreed she performed her job excellently. No defendant had any complaints about Ms. Scott-Harris' performance. No defendant had any complaints about the benefits to the city from the reorganization that created Ms. Scott-Harris' position. The position worked out well and she worked well in the position.

Despite her excellent performance Ms. Scott-Harris' position was eliminated as of March 29, 1991. All of the defendants in this case – Mayor Daniel Bogan, City Council Vice President Marilyn Roderick, and the City of Fall River – took the position that Ms. Scott-Harris' job was eliminated only for fiscal reasons. Ms. Scott-Harris alleged in her complaint, and the jury found, that her position was eliminated in retaliation for her exercise of her First Amendment rights to complain about racism at City Hall and specifically in retaliation for her efforts to have a politically well connected racist city employee, Dorothy Biltcliffe, fired.

### Dorothy Biltcliffe

Dorothy Biltcliffe was a long-time employee of Fall River. She knew the defendants Marilyn Roderick and Daniel Bogan for decades. She was politically active and well connected. She boasted of her contacts on the "sixth floor" of City Hall, where the mayor's office was located.

Ms. Scott-Harris was Ms. Biltcliffe's direct superior. They did not get along well. Ms. Biltcliffe simply refused to follow Ms. Scott-Harris' directions. Other employees complained that Ms. Biltcliffe yelled at them and threatened them, often making racial remarks. Speaking to other city employees, she referred to Ms. Scott-Harris as the "black nigger bitch" and to another nutrition program employee as a "little black bitch." She made frequent references to her friends in the mayor's office and often threatened to go to the "sixth floor" and talk to her "friends" there about her complaints. Ms. Biltcliffe's conduct came to a head in mid-October 1990 when at a meeting she flew into a rage and told the assistant director of the nutrition program that she was a "bitch with her head stuck up [Ms. Scott-Harris'] ass." She said she was not going to take this treatment and would "go to the sixth floor and get anything [she] wanted."

Ms. Scott-Harris contacted assistant Corporation Counsel Paul Desmarais and asked for help preparing charges against Ms. Biltcliffe. Desmarais told Ms. Scott-Harris that he wouldn't "touch a case with Dorothy Biltcliffe, she has been around a long time and she was really tough." No city attorney was appointed and Ms. Scott-Harris was forced to draw up the charges against Ms. Biltcliffe by herself.



Before Dorothy Biltcliffe, no Fall River city employee had ever been disciplined for making racial comments or for racist behavior.

Ms. Scott-Harris gave the charges to Ms. Biltcliffe. Ms. Biltcliffe responded by calling Ms. Scott-Harris "nothing but a black nigger bitch" and said Ms. Scott-Harris would not get away with this and that she "knew people" and she knew things and that Ms. Scott-Harris was "going to be sorry." The city eventually appointed an outside special assistant corporation counsel to present the charges. This man was eighty years old, blind and hard of hearing.

Ms. Biltcliffe went on medical leave for hypertension immediately after being informed of the charges against her. Her physician, who recommended the medical leave, was the chairman of the city's Board of Health. The hearing on the charges against Ms. Biltcliffe was scheduled for November 5, 1990. At her request the city continued that hearing to November 27 then to December 12 and then to February 28, 1991.

### Ms. Scott-Harris' position is eliminated

By the date of the hearing, Ms. Scott-Harris' situation at City Hall had changed dramatically. Shortly after the charges were lodged against Ms. Biltcliffe, Ms. Scott-Harris was called to the City Manager's office. He told her he had received a telephone call from the defendant City Council Vice President Marilyn Roderick questioning Ms. Scott-Harris' use of a city automobile. He ordered Ms. Scott-Harris to "just park it," which she interpreted as meaning she should not use the car. The day before

that meeting Ms. Scott-Harris had received a telephone call from State Senator Thomas Norton asking her to come to his office. When she went to Sen. Norton's office he told her Dorothy Biltcliffe had been calling him demanding that he intervene on her behalf. Sen. Norton then asked Ms. Scott-Harris whether she could do anything to resolve the Dorothy Biltcliffe matter. Sen. Norton asked Ms. Scott-Harris to speak with City Manager Robert Connors, saying "Bob will do what I tell him to do."

In December, Ms. Scott-Harris began hearing rumors that her position "was going to take a political hit." Then on February 12, 1991, Connors told Ms. Scott-Harris that her position was being eliminated.

Mayor Bogan had several options in regard to removing Ms. Scott-Harris from the city payroll. He could have acted on his own under authority under the Massachusetts General Laws and simply removed Ms. Scott-Harris from her position. He could have left the position vacant but unfunded, as he had done for the positions of directors of Public Health, Veterans Affairs and the Council on Aging for more than a year. Lastly, he could have recommended to the City Council that the Department of Health and Human Services be eliminated. All three options would have had the same financial impact on the city. He chose the third option.

Even though Ms. Scott-Harris was told by the city manager on February 12, 1991 that her position had been eliminated and even though Mayor Bogan wrote to the city clerk on March 18, 1991 informing the clerk that Ms. Scott-Harris' position was eliminated effective March 29,



the city council had not yet acted on his recommendation. The city council ordinance committee, chaired by Ms. Roderick, voted to approve elimination of Ms. Scott-Harris' position on March 21, 1991. The full city council met later in March and voted 6-2 to eliminate her position. The only effect of the ordinance passed by the City Council was to eliminate Ms. Scott-Harris' position. While these events were happening the Fall River newspaper had frequent articles about the events, with the articles normally on the top of the front page of the daily newspaper.

Ms. Scott-Harris' last day of employment with the city was March 29, 1991.

**Dorothy Biltcliffe returns to work**

On March 27 or 28 Attorney Roberts told Ms. Scott-Harris the city had settled its charges against Dorothy Biltcliffe. Ms. Biltcliffe would not have to admit to any wrongdoing and would accept a 60 day suspension, to begin the day after Ms. Scott-Harris left. Ms. Biltcliffe's suspension was due to end June 21, 1991. The city manager and the city's personnel director testified it was improper for the mayor to have any role in the discipline imposed on a city employee following a hearing. Nonetheless, Mayor Bogan ordered Ms. Biltcliffe to be reinstated June 3, rather than June 21.

**Marilyn Roderick**

The defendant Marilyn Roderick has been "in city government" in Fall River for 20 years. At the time of trial she had been on the city council for 18 years.

Councilwoman Roderick had a run-in with Ms. Scott-Harris early in Ms. Scott-Harris' tenure with the city. Ms. Scott-Harris took offense at comments Ms. Roderick made about black people and the two of them shouted at one another. Ms. Roderick "started to rake me over the coals about how I should be proud of my people," Ms. Scott-Harris said. In reply, Ms. Scott-Harris yelled at Ms. Roderick that her remarks were totally inappropriate and were racist. Ms. Scott-Harris portrayed the exchange as "a screaming, shouting, pointing match." After that confrontation their relationship was bitter and conflicting.

Ms. Roderick called Ms. Scott-Harris to testify at several public meetings. In those meetings Ms. Roderick spoke to Ms. Scott-Harris in a tone of voice that Ms. Scott-Harris described as "just ugly," a tone of voice she did not use in speaking to other city employee managers. Ms. Scott-Harris said appearing before Ms. Roderick in public was embarrassing and humiliating.

After the discrimination charges were brought against Ms. Biltcliffe, she contacted Ms. Roderick and said "she was having a problem with Janet Scott-Harris." Ms. Biltcliffe said she was having difficulty with an investigation going on and said she had been accused of "calling [Ms. Scott-Harris] names." Ms. Biltcliffe asked Councilwoman Roderick to look into the problem. Roderick knew the investigation involved racial allegations and she told Ms. Biltcliffe that Janet Scott-Harris had called her a racist, too. Roderick viewed the racism accusation against Ms. Biltcliffe as the same kind of accusation that had been made against her by Ms. Scott-Harris. She told Ms. Biltcliffe she would speak with the



City Manager about the investigation and she did speak with him.

Ms. Roderick learned that Ms. Biltcliffe had called at least one other city council member, Raymond Mitchell, about the charges Ms. Scott-Harris had brought against her. Besides herself and Councilor Mitchell, Ms. Roderick said that "very often constituents will speak to most of us." Councilwoman Roderick and Councilor Mitchell are "very close friends" and they discussed the problem Dorothy Biltcliffe was having with Ms. Scott-Harris. Another city councilor, John Medeiros, called Ms. Scott-Harris before the vote to eliminate her position and asked her why "they were trying to get rid of" her.

**The reasons why Ms. Scott-Harris was fired**

All three defendants – Marilyn Roderick, Daniel Bogan and the City of Fall River – offered a single explanation for why Ms. Scott-Harris was fired. The one and only reason for the elimination of her position was to save the city money. Her job performance had nothing to do with the decision to eliminate her position. In fact, they agreed her job performance had been excellent. The jury rejected the defendants' stated reason and specifically found, in response to a jury interrogatory, that the plaintiff had proven that the reason stated by the defendants for terminating Ms. Scott-Harris "was not the real reason" for their action.

For the last year or so prior to her termination the positions of the three department heads Ms. Scott-Harris was supposed to supervise – Veterans Affairs, Public Health and the Council on Aging – were all vacant. While

those positions were vacant Ms. Scott-Harris performed all of the day to day duties of each of those three positions. Mayor Bogan had no complaints about the way Ms. Scott-Harris was performing her job or the three jobs of Veterans Agent, Director of Public Health and Director of the Council on Aging.

Even though Ms. Scott-Harris had been performing the jobs of the directors of the Veterans Affairs Department, the Director of the Department of Public Health and the Director of the Council on Aging for more than a year with no problems, all three positions were funded in the fiscal year 1992 budget. The jury learned that the city saved $46,305 by eliminating Ms. Scott-Harris' position. The jury also learned the city spent $105,205 to fund the three vacant positions whose jobs Ms. Scott-Harris had been performing with no problems or complaints.

Additionally, the jury learned that at the same time Bogan proposed to eliminate Ms. Scott-Harris' position because he said he anticipated a ten percent reduction in state funding, Bogan was writing his fiscal year 1992 budget proposal. In Mayor Bogan's introduction to that 1992 budget Bogan said the budget was prepared assuming "$62,802,604 from State Aid (Cherry Sheet)." The prior year's budget states it was prepared assuming "$61,623,177 from State Aid (Cherry Sheet)." The jury thus could have concluded that rather than anticipating a decrease in state aid from fiscal year 1991 to 1992, Bogan prepared his budget assuming an increase in state aid.

On February 12, 1991 Ms. Scott-Harris was informed her employment with the city would terminate. She was



the only city administrator whose employment was terminated. Although some 135 positions – only 27 of which were currently filled by city employees – were eliminated later that fiscal year, none of those persons were notified of their termination until May 1991. The city's personnel director said Mayor Bogan asked her to prepare a "list of those folks that were going to be affected by the layoff in the fiscal '92 budget, what that included was by department, by position, by name of employee, their last day of work and how many hours [years] of service they had." She prepared that list. It did not contain Janet Scott-Harris' name. The list was prepared shortly before the employees were notified on May 15, 1991.

The only position added by the 1992 budget was the second administrative assistant in the Council on Aging, the position filled June 1, 1991 by Dorothy Biltcliffe.

## REASONS FOR DENYING THE WRIT

### I. THE FIRST CIRCUIT'S APPROACH TO ABSOLUTE LEGISLATIVE IMMUNITY IS CONSISTENT WITH THE OPINIONS OF THIS COURT AND OTHER FEDERAL APPELLATE COURTS IN THAT A DETERMINATION OF THE LEGISLATIVE OR NON-LEGISLATIVE CHARACTER OF THE ACT MUST FIRST BE MADE BEFORE IMMUNITY CAN SHIELD A MUNICIPAL OFFICIAL FROM SUIT.

#### A. Neither the opinions of this Court nor other federal appellate courts, including the First Circuit Court of Appeals, permit a municipal officer to be shielded by absolute legislative immunity where the function in which the actor is engaged is not a legitimate legislative function.

Absolute immunity is a powerful legal doctrine. It provides a complete bar to personal liability for officials, regardless of culpability. *See, Acevedo-Cordero v. Cordero-Santiago*, 958 F.2d 20, 22 (1st Cir. 1992). The Supreme Court "has generally been quite sparing in its recognition of claims to absolute official immunity." *Forrester v. White*, 484 U.S. 219, 224 (1988). Officials seeking to be shielded by such immunity have the burden to show that the exemption is justified by overriding policy considerations. *Id.* The Court has also sought to avoid unnecessarily broadening the scope of absolute immunity by recognizing the doctrine of qualified immunity, which may provide a bar to liability where the official can show the contested actions were reasonable. *See, Forrester v. White*, 484 U.S. at 224; *Acevedo-Cordero v. Cordero-Santiago*, 958 F.2d at 22. On the one hand, the threat to government officials of liability for damages is meant to encourage the



exercise of official duties in a lawful and appropriate manner and to discourage conduct which may expose an official to liability. *See, Forrester v. White*, 484 U.S. at 223. At the same time, the Court has acknowledged that important policy considerations support the protection which immunity affords against personal liability for acts taken in the proper performance of an official's duties. *Id.* For example, a government official should not be inhibited from taking official action which may be unpopular or have adverse effects on certain people because of the threat of personal liability. *Id.* However, government officials are not entitled to absolute immunity for all actions they take. *See, e.g., Forrester v. White*, 484 U.S. at 224-225; *Acevedo-Cordero v. Cordero-Santiago*, 958 F.2d 20, 23 (1st Cir. 1992); *Rateree v. Rockett*, 852 F.2d 946, 950 (7th Cir. 1988).

Absolute immunity for the acts of officials is appropriate only under limited circumstances. The Court has articulated a "functional" approach to assist in making this determination. *Forrester v. White*, 484 U.S. at 224. Under this approach, there must be an inquiry beyond the title or position of an official into the nature of the functions which an official has been lawfully entrusted and the effect that exposure to liability would likely have on the exercise of those functions. *Id.* In the legislative context, the functional approach requires a determination of whether an act is "in the sphere of legitimate legislative activity" for which legislators are immune from 42 U.S.C. §1983 liability, *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951), or administrative, for which legislators may be entitled to qualified immunity but not absolute immunity.

The circuit courts have adopted slightly different standards to determine when absolute immunity should protect legislators from civil liability. As the Petitioners point out, the majority of the circuits, including the First Circuit, rely on common indicators such as "whether the action taken is traditionally legislative, involves the formulation of prospective, legislative-type policies rather than enforcement or application of existing policies, and whether the procedures followed in the action are those akin to proper legislative action." Petition p. 11. *See, e.g., Alexander v. Holden*, 66 F.3d 62, 66-67 (4th Cir. 1995) (adopting two-part test focusing or general or specific nature of underlying facts relied on in decision making process and general or specific nature of impact); *Hughes v. Tarrant County, Tex.*, 948 F.2d 918, 921 (5th Cir. 1991) (applying test of whether facts relied on were general, legislative facts related to broad policy or specific facts related to individual situation); *Ryan v. Burlington County, NJ*, 889 F.2d 1286, 1290 (3rd Cir. 1989) (actions must be both substantively and procedurally legislative); *O'Brien v. City of Greers Ferry*, 873 F.2d 1115, 1119 (8th Cir. 1989) (legislative act involves a formulation of policy governing future conduct of all or a class of the citizenry); *Cinevision Corp. v. City of Burbank*, 745 F.2d 560, 580 (9th Cir. 1984), *cert. denied*, 471 U.S. 1054 (1985) (distinguishing between the formulation and the application of policy); *Cutting v. Muzzey*, 724 F.2d 259, 261 (1st Cir. 1984) (articulating two part test focusing on nature of underlying facts used to reach a decision and nature of impact of decision).



The two-part test adopted by the First Circuit focuses on the nature of the underlying facts on which the decision is based and on the particularity of the impact.[1] *Cutting v. Muzzey*, 724 F.2d at 261. If the decision is based on "legislative facts," that is, a generalization which concerns a "policy or state of affairs" and which impacts a general policy, it is legislative. *Id.* If, on the other hand, the decision is based on specific facts relating to individual people or situations that "single out specific individuals and affect them differently from others," it is administrative. *Cutting v. Muzzey*, 724 F.2d at 261 (citation omitted). The second test focuses on the particularity of the impact of the action. *Id. Cutting v. Muzzey* has been followed by the First Circuit in other cases. *See, e.g., Negron-Gaztambide v. Hernandez-Torres*, 35 F.3d 25, 28 (1st Cir. 1994), *cert. denied*, 115 S.Ct. 1098 (1995); *Vacca v. Barletta*, 933 F.2d 31, 33 (1st Cir. 1991), *cert. denied*, 502 U.S. 866 (1991); *Acevedo-Cordero v. Cordero-Santiago*, 958 F.2d 20. These decisions have been cited and followed by other federal courts. *Roberson v. Mullins*, 29 F.3d 132, 135 (4th Cir. 1994); *Alexander v. Holden*, 66 F.3d 62, 65 (4th Cir. 1995); *Hughes v. Tarrant County, Texas*, 948 F.2d 918, 920 (5th Cir. 1991); *Haskell v. Washington Township*, 864 F.2d

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[1] This Court has denied petitions for certiorari seeking review of the First Circuit's position on legislative immunity several times. *See, Vacca v. Barletta*, 933 F.2d 31, *cert. denied*, 502 U.S. 866 (1991) (Ejection of school committee member during debate on school budget was administrative, not legislative act) and *Negron-Gaztambide v. Hernandez-Torres*, 35 F.3d 25 (1st Cir. 1994), *cert. denied*, 115 S.Ct. 1098 (1995) (decision of legislative officials to discharge a legislative librarian from her position was an administrative decision and therefore was not protected by absolute legislative immunity).

1278 (6th Cir. 1988); *Crymes v. Dekalb County, Georgia*, 923 F.2d 1482, 1485 (11th Cir. 1991); *Moore v. Trippe*, 743 F. Supp. 201, 207 (S.D.N.Y. 1993); *Christian v. Cecil County Maryland*, 817 F. Supp. 1279, 1287 (D. Md. 1993), and see cases collected in *Smith v. Lomax*, 43 F.3d 402, 405-06 (11th Cir. 1995).

The Supreme Court and many federal courts recognize that under this "functional approach" absolute immunity does not apply to decisions concerning the hiring, firing or demotion of a person because such acts are administrative decisions, regardless of the title or position of the official. *See, e.g., Forrester v. White*, 484 U.S. at 229-30 (1988) (judge's firing of a probation officer was not within judicial immunity because it was an administrative act); *Gross v. Winter*, 876 F.2d 165, 170-73 (D.C. Cir. 1989) (council member who discharged legislative researcher, allegedly on account of her religion, acted in administrative capacity and not entitled to immunity); *c.f. Rateree v. Rockett*, 852 F.2d 946, 950 (7th Cir. 1988) (finding absolute immunity under the facts of that case involving elimination of position through passage of budget ordinance, but agreeing with plaintiffs "to the extent that employment decisions generally are administrative . . . "). Similarly, the fact that a legislative body accomplishes an action by vote does not by itself render the action a legislative one. *Alexander v. Holden*, 66 F.3d 62, 67 (4th Cir. 1995) (where the board of commissioners eliminated the salary of the position held by plaintiff, consolidated the position with another position, and refused to reappoint the plaintiff to the new position, the facts underlying the decision and the impact of the decision were specific, rendering it an administrative employment decision);



*Smith v. Lomax*, 45 F.3d 402, 405-06 (11th Cir. 1995) (vote by members of county board not to reappoint plaintiff as board clerk did not constitute broad, general policy making and therefore the members were not protected by legislative immunity); *Roberson v. Mullins*, 29 F.3d 132, 134-35 (4th Cir. 1994) (voting to terminate an employee does not involve the adoption of prospective legislative rules and therefore members of county board of supervisors who voted to terminate plaintiff as superintendent of public works were not entitled to legislative immunity); *Reitz v. Persing*, 831 F. Supp. 410 (M.D. Md. 1993) (chief of police, mayor and city council members acted in administrative capacity in decision to fire plaintiff parking ticket officer and therefore not entitled to absolute immunity).

**B. Disputed facts material to a determination of legislative immunity must be submitted to a jury, as in the present case.**

An act of a legislative body may be characterized as administrative as a matter of law where the relevant underlying facts are uncontroverted. *See, Cutting*, 724 F.2d at 261; *Vacca v. Barletta*, 933 F.2d at 33. When the underlying facts necessary to the decision are contested, however, those facts must be submitted to the jury to address two-part inquiry developed under *Cutting v. Muzzey*: (1) were the underlying facts on which the decision was based generalizations concerning policy or specific as they relate to individuals and (2) did the act have a general or particular impact. *See, Acevedo-Cordero v. Cordero-Santiago*, 958 F.2d at 23 (summary judgment was improper on issue of absolute immunity where there

was a factual dispute concerning whether the legislative body's decision to eliminate positions allegedly in violation of plaintiffs' right to free political association was a legitimate budget action entitled to immunity or a ruse to replace party supporters). This application of the functional approach is consistent with the thoughtful considerations and balancing of interests articulated by the opinions of this Court and of the federal courts as discussed above concerning the justifications for and the appropriate application of absolute immunity.

In this case, the issue of whether the position-elimination ordinance was a purely legislative budgetary matter or an administrative decision to specifically fire Ms. Scott-Harris properly went to the jury. *See, Scott-Harris v. City of Fall River,* et al., slip op. at 30. When relevant facts under the *Cutting v. Muzzey* analysis are genuinely disputed, the question of whether an act is "administrative" as opposed to "legislative" is properly treated as a question of fact to be decided at trial. *Acevedo-Cordero,* 958 F.2d at 23. The questions submitted to the jury and the jury's ultimate findings concerning the liability of the individual defendants are consistent with the test articulated in *Cutting.*[2] In rejecting defendants' argument concerning absolute legislative immunity the

[2] Contrary to Petitioners' contention, the enactment of the Ordinance was not the only allegedly wrongful act at issue. Petition p. 16, n. 3. Evidence was offered by plaintiff concerning Mayor Bogan's conduct prior to and surrounding his recommendation of the ordinance and the jury was asked to decide on the recommendation. Similarly, evidence was offered concerning Roderick's chair of the ordinance committee which reported out the ordinance.



Court of Appeals held that the jury's findings "reflect the jury's belief that the individual defendants relied on facts relating to a particular individual – Scott-Harris – in the decision making calculus and devised an ordinance that targeted Scott-Harris and treated her differently from other managers employed by the City." *Scott-Harris v. City of Fall River,* et al., slip op. at 31. None of the defendants objected to the jury instructions nor did they proffer an interrogatory to determine the applicability of the doctrine of absolute immunity. The Court of Appeals properly found that the position-elimination ordinance was, under the facts of this case, really no more than "the means employed by Scott-Harris' antagonists to fire her." *Id.*

Petitioners turn the First Circuit's inquiry into the motives of the defendants in order to determine whether they were acting in a legislative or administrative function on its head. Petitioners state that "in essence . . . the First Circuit held that the motives underlying the action, rather than the function of the action, i.e., legislative or administrative, was determinative of whether an individual legislator is entitled to . . . protections." Petition p. 20. Respondent suggests that the resolution of the issue of whether the individual actors were substantially motivated by fiscal considerations, as defendants argued to the trial court, or were acting to fire Scott-Harris in retaliation for her complaints about racial discrimination at City Hall, as the jury found, necessarily preceded a determination of whether the defendants' acts were legislative or administrative in accordance with the functional approach articulated by *Forrester v. White,* 484 U.S. 219, and explained by *Cutting v. Muzzey,* 724 F.2d 259.

Petitioners' statement of facts ignores or underdevelops crucial facts on which the jury arguably relied in determining that the individual defendants were motivated by considerations which would be determinative of the legislative or administrative function at issue. For example, the timing of events surrounding Scott-Harris' separation from employment raised material issues of fact regarding whether the position-elimination ordinance was part of the City Council's budget deliberations at all. Ms. Scott-Harris was told in February 1991 by Mayor Bogan that her job was being eliminated. Mayor Bogan wrote to the city clerk on March 18, 1991 notifying him that the position would be eliminated. The ordinance committee, headed by defendant Roderick, voted to recommend the position-elimination ordinance on March 21, 1991. All those actions took place before the City Council voted to eliminate Ms. Scott-Harris' position, creating an inference that Scott-Harris' removal was a done deal before it was even addressed by the City Council. In contrast to these actions concerning only Ms. Scott-Harris in February and March 1991, all other city employees who were affected by budget cuts voted on at other times by the City Council were notified in May 1991. The jury finding that Ms. Scott-Harris was not eliminated as part of the city's general budget cuts was supported by a list, prepared by the Personnel Department at Bogan's request, purportedly showing every employee affected by that fiscal year's budget cuts. Ms. Scott-Harris' name was not included on that list.

In addition, evidence concerning Bogan's decision to eliminate Scott-Harris' position supported the jury's rejection of Bogan's claim that his decision was based on



budget considerations. Bogan instructed Connors, the city administrator, to propose a list of lay-offs and proposals to cut costs. As a department head, Scott-Harris submitted a proposal for budget cuts in her department. Bogan rejected this proposal without even reading it and decided to fire her instead. Even when Connors opposed cutting Scott-Harris' position and even though Connors did not suggest eliminating her position, Bogan made the decision to terminate Scott-Harris anyway at precisely the time the hearings concerning her race discrimination allegations were scheduled. All these actions support the inference that Bogan's decision to fire Scott-Harris had nothing to do with saving money for the city, as the jury found.

Bogan did not need City Council approval to dismiss Ms. Scott-Harris. He could have dismissed her pursuant to his state statutory authority and allowed her position to remain vacant, just as he had done with the directors of public health, the council on aging and veteran affairs. Because he could have acted without City Council approval Bogan's actions were executive in nature and therefore not entitled to immunity. *See, Carver v. Foerster*, 102 F.3d 96, 100 (3rd Cir. 1996) (mayor who gave a unilateral order to have supporters of unsuccessful election candidate fired was engaging in either executive decision of how anticipated cutbacks should be implemented or an administrative decision that certain individuals should be fired).

The defendants should not be offered the opportunity to cloak what would otherwise be an undisputed administrative action under legislative immunity by opting to run the discharge through a city council vote in the

form of a position-elimination ordinance that had the singular effect of eliminating Scott-Harris' job. This is not a situation in which difficult legislative budget decisions resulted in job loss for one or several individuals, but instead was a situation where a jury found that individual defendants attempted to fire a specific city employee based on facts particular to that individual, rather than on policy considerations. In a situation such as this, where government officials punished one person for her exercise of her free speech rights and then voluntarily elected to confirm that decision by a city council vote, there should be no absolute shield from liability.[3] *See, supra,* discussion of *Forrester v. White,* 484 U.S. at 223. The opinions of this Court and of many federal courts support

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[3] The Court of Appeals found there was insufficient evidence of bad motives on the part of a majority of the City Council members and thus the city itself could not be found liable. Proof of the motivation of individual members of a legislative body is an almost impossible task. *Rogers v. Lodge,* 458 U.S. 613 (1982); *Hunter v. Underwood,* 471 U.S. 222, 228 (1985). Courts rarely attempt to determine the state of mind of individual members of a legislative body; even determining the collective intent of a legislature is a difficult enough task, "a perilous enterprise," and is ordinarily disfavored in constitutional law. *See, e.g., Edwards v. Aguillard,* 482 U.S. 578, 636-639 (1987) (Scalia, J., dissenting) ("discerning the subjective motivation of those enacting the statute is, to be honest, almost an impossible task"); *United States v. O'Brien,* 391 U.S. 367, 383 (1968); *South Carolina Educ. Ass'n v. Campbell,* 883 F.2d 1251, 1257-1262 (4th Cir. 1989).

As a result of the Court of Appeals' decision reversing the judgment against the city, allowing the individual defendants to escape liability, despite the jury finding that they fired Ms. Scott-Harris in retaliation for her complaints about racism, would leave her without a remedy.



the proposition that recourse for this type of wrongful act should be available through suit, and not simply through the ballot box, as petitioners suggest.

The opinion of the First Circuit does not alter the doctrine of absolute legislative immunity as articulated by relevant decision of this Court.

## II. THE FIRST CIRCUIT'S DECISION REGARDING CAUSATION INVOLVES A QUESTION OF FACT WHOLLY WITHIN THE PROVINCE OF THE FACT FINDER AND DOES NOT RAISE AN ISSUE OF SUBSTANTIAL IMPORTANCE REGARDING LIABILITY OF LEGISLATORS PURSUANT TO 42 U.S.C. §1983

The issue of causation was correctly left to the jury in questions 7 and 10, as follows:

> Has Ms. Scott-Harris proven that the act of Councilwoman Marilyn Roderick in voting favorably toward the amendments was a proximate cause of the elimination of the position?
>
> Do you find that the act of Mr. Bogan in recommending the amendment was the proximate cause of the elimination of the position?

No party objected to these instructions, and they became the law of the case. *Smith-Harris v. City of Fall River,* et al., slip op. at 33, citing, *Moore v. Murphy,* 47 F.3d 8, 11 (1st Cir. 1995); *Milone v. Moceri Family, Inc.,* 847 F.2d 35, 38-39 (1st Cir. 1988). Now petitioner claims that the decision of the Court of Appeals regarding this factual determination raises issues of substantial importance

regarding individual liability of legislators pursuant to 42 U.S.C. §1983.

If a fact finder concludes that the harm suffered by the plaintiff was a reasonably foreseeable result of an individual legislator's conduct, the legislator can be found liable. Individual defendants can be found liable for their acts, regardless of the liability of the municipal body. *See, e.g., Springer v. Seamen,* 821 F.2d 871 (1st Cir. 1987) (individuals who induced the Postal Service to take disciplinary action against an African-American contractor were subject to liability even though the postal service was freed from liability when there was no evidence that it was motivated by racial animus.)

The question of causation was a purely factual one. A petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings. Sup.Ct. R. 10.



## CONCLUSION

For the reasons stated the Respondent Janet Scott-Harris requests that this Court deny the Petitioners' request for a petition for a writ of certiorari to review the judgment and opinion of the First Circuit Court of Appeals.

Respectfully submitted,

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